

**UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
REGION THIRTEEN**

DURHAM SCHOOL SERVICES, INC.

Employer

and

Case 13-RC-21934

**TEAMSTERS LOCAL 301, AFFILIATED WITH THE
INTERNATIONAL BROTHERHOOD OF TEAMSTERS**

Petitioner

DECISION AND DIRECTION OF ELECTION

Upon a petition duly filed under Section 9(c) of the National Labor Relations Act, as amended, a hearing on this petition was held on May 12, 2010¹, before a hearing officer of the National Labor Relations Board to determine when it would be appropriate to conduct an election on the petition.²

I. ISSUE

The only issue raised at the hearing was when it would be appropriate to conduct an election on the instant petition. The Petitioner sought an election in June 2010 or, alternatively, at the end of August 2010. The Employer contended that the appropriate time to conduct an election would be in October 2010, after its operations settled down after the start up of the school year.

II. DECISION

For the reasons discussed in detail below, I find it is inappropriate to conduct an election in the summer months when most of the unit employees are not working. Accordingly, to

¹ All dates are 2010 unless otherwise noted.

² Upon the entire record in this proceeding, the undersigned finds:

a. The hearing officer's rulings made at the hearing are free from error and are hereby affirmed. The record in this matter consists of the parties' offer of proof as to the timing of the election. In reaching my decision I have given careful consideration to their offers of proof and treated them as if they were record evidence.

b. The Employer is engaged in commerce within the meaning of the Act and it will effectuate the purposes of the Act to assert jurisdiction herein.

c. The labor organizations involved claim to represent certain employees of the Employer.

d. A question affecting commerce exists concerning the representation of certain employees of the Employer within the meaning of Section 9(c)(1) and Section 2(6) and (7) of the Act.

balance the Board's policies of providing expeditious elections with the policy of maximizing the opportunity for unit employees to vote in an election, I shall issue a subsequent notice of intent to conduct an election which will direct an election in the unit described below at an appropriate time after the commencement of the school year:

All full-time and regular part-time bus drivers employed by the Employer at its facility located at 23479 Dewes St., Antioch, Illinois, but excluding all managers, supervisors, mechanics, administrative employees, office clerical employees and guards, professional employees, and supervisors as defined in the National Labor Relations Act.

III. STATEMENT OF FACTS

The Employer provides bus transportation services to school districts. It employs between 40 and 45 unit employees at the Antioch facility, most of who drive for one school district, District 117. At the end of this school year in District 117, which is May 26, most of the drivers are laid off. There is some summer work which the drivers may accept for summer camps and summer school activities. During the preceding year, about 14 drivers had regular schedules during the summer. Other drivers had sporadic charter work. However, at the time of the hearing the Employer had not received any confirmed orders for summer work and due to the economic downturn the Employer expected that there may be less summer work this year than in the past. The next school year for District 117, when most of the drivers' work, will begin in mid-August 2010. The Employer brings these drivers back about a week before the start of the school year for orientation and dry runs. The other schools serviced by the Employer from its Antioch location start up about a week later. There is about a 10 percent turnover of drivers from school year to school year, which sometimes can go as high 30 percent according to the Employer. During the first two to four weeks of the school year, the school districts may change the bus routes based on demographic changes in the district. Last year school districts serviced by the Employer consolidated two routes and eliminated one route.

IV. ANALYSIS

The Petitioner contends that the Employer's operations are cyclical rather than seasonal, and, under Board precedent on cyclical operations, an election can be held in the summer without waiting for a peak in employment, citing *Baugh Chemical Co.*, 150 NLRB 1034 (1965) and *Aspen Skiing Corp.*, 143 NLRB 707 (1963). The Employer contends that its operations are seasonal and, thus, the election should be scheduled to coincide with the seasonal peak after the start of the new school year. The Employer further contends that the election should not be scheduled until October 2010 when all its operations for the school year are finalized.

A cyclical operation is one that is conducted on a year round basis with permanent employees but which has one or more peak periods of operations during a year where additional employees are added. Because there is a permanent work force, the Board, in setting an election date, takes into account the impact of waiting for a peak employment period on the permanent employees exercising their rights under the Act. The Board may set an immediate election or set an election at an upswing in operations, even if it not the ultimate peak in operations, depending

upon the length of delay to the permanent year-round employees. *Elsa Canning Co.*, 154 NLRB 1810 (1965). In *Elsa Canning*, the Board held that the election should be conducted at the next representative season, November, in which it was expected that the employer would have 47 employees rather than delay the election for seven months until June of the next year when the Employer would have 200 employees.

A seasonal employer is distinguished from a cyclical employer in that a seasonal employer generally operates only for a portion of the year. In this type of operation, the Board will not schedule an election when the employer is not operating but will wait to schedule an election until the employer starts up operations and employment approaches the operational peak. There is little or no impact in delaying the election on employees as they are not working during most of the delay. *Bogus Basin Recreation Assn.*, 212 NLRB 833 (1974).

Regardless of whether the instant Employer's operations are labeled seasonal or cyclical, in the circumstances herein, I find that the election should be conducted after the commencement of the 2010 school year. *Elsa Canning*, supra at 1812-1813 (1965); *Tusculum College*, 199 NLRB 28, 33 (1972). The rationale underlying the Board's cases on both cyclical and seasonal operations is based on balancing the impact of the delay on the employees' exercise of their right to select or reject a bargaining representative under Section 7 of the Act with facilitating that right to the greatest number of employees. In the instance case, I find that balance is best met by scheduling an election after the start of the new school year in August 2010. It is already too late to conduct an election before the end of the current school year. Holding an election in the summer, as the Petitioner seeks, does not give proper weight in balancing these policies to facilitating the right to vote to greatest number of employees. There is too much uncertainty as to the number of employees that will work in the summer or the availability of those not working to vote in an election during the summer. On the other hand, delaying the election until sometime in October, as the Employer seeks, does not give the appropriate weight to the employees right to an expeditious election. A factor in the Board's decision to conduct an immediate election in *Aspen Skiing* was a six month delay between the hearing and scheduling the election at the employer's operational peak. In the instance case, there would be a five month delay between the hearing and an election scheduled in October as the Employer seeks. Most of the employees are brought back a week prior to the mid-August start of the school year by the Employer's major customer, District 17. The six to eight weeks delay that the Employer seeks after the commencement of operations for the school year is mostly based on the administrative convenience of the Employer to get its operations in order and the bus routes finalized.

In reaching an appropriate balance between the negative impact of delaying the election with the desire to facilitate the voting right to the greatest number of employees, I find that the election should take place in late August or first week of September after the Employer commences operations at the start of the new school year. By the end of August, almost all of the employee complement will be working, which is, in the view of the undersigned, a more significant factor in the balancing of policies of scheduling an election than waiting until the routes are finalized.

V. CONCLUSION

Based on the foregoing and the entire record herein, I have found that the election should not be held until after the Employer commences its regular operations at the start of the school year in August 2010. Accordingly, I shall issue a subsequent notice of intent to conduct an election directing an election in the above unit at an appropriate time after the commencement of the school season.

VI. DIRECTION OF ELECTION

An election by secret ballot shall be conducted by the undersigned among the employees in the unit(s) found appropriate at the time and place set forth in the notice of intent to conduct an election to be issued subsequently, subject to the Board's Rules and Regulations. Eligible to vote are those in the unit(s) who were employed during the payroll period ending immediately preceding the notice of intent to conduct election, including employees who did not work during that period because they were ill, on vacation, or temporarily laid off. Employees engaged in any economic strike, who have retained their status as strikers and who have not been permanently replaced are also eligible to vote. In addition, in an economic strike which commenced less than 12 months before the election date, employees engaged in such strike who have retained their status as strikers but who have been permanently replaced, as well as their replacements are eligible to vote. Those in the military services of the United States may vote if they appear in person at the polls. Ineligible to vote are employees who have quit or been discharged for cause since the designated payroll period, employees engaged in a strike who have been discharged for cause since the commencement thereof and who have not been rehired or reinstated before the election date, and employees engaged in an economic strike which commenced more than 12 months before the election date and who have been permanently replaced. Those eligible shall vote whether or not they desire to be represented for collective bargaining purposes by the Teamsters Local 301, affiliated with the International Brotherhood of Teamsters or no labor organization.

VII. NOTICES OF ELECTION

Please be advised that the Board has adopted a rule requiring that election notices be posted by the Employer at least three working days prior to an election. If the Employer has not received the notice of election at least five working days prior to the election date, please contact the Board Agent assigned to the case or the election clerk.

A party shall be estopped from objecting to the non-posting of notices if it is responsible for the non-posting. An Employer shall be deemed to have received copies of the election notices unless it notifies the Regional office at least five working days prior to 12:01 a.m. of the day of the election that it has not received the notices. *Club Demonstration Services*, 317 NLRB 349 (1995). Failure of the Employer to comply with these posting rules shall be grounds for setting aside the election whenever proper objections are filed.

VIII. LIST OF VOTERS

To insure that all eligible voters have the opportunity to be informed of the issues in the exercise of their statutory right to vote, all parties to the election should have access to a list of voters and their addresses, which may be used to communicate with them. *Excelsior Underwear, Inc.*, 156 NLRB 1236 (1966); *NLRB v. Wyman-Gordon Company*, 394 U.S. 759 (1969). Accordingly, it is directed that 2 copies of an eligibility list containing the full names and addresses of all the eligible voters must be filed by the Employer with the undersigned within 7 days from the date of the notice of intent to conduct an election to be issued subsequently. *North Macon Health Care Facility*, 315 NLRB 359 (1994). The undersigned shall make this list available to all parties to the election. In order to be timely filed, such list must be received in Region 13's Office, 209 South, LaSalle Street, Suite 900, Chicago, Illinois 60604 on or before the date set forth in the notice of intent to conduct an election. No extension of time to file this list shall be granted except in extraordinary circumstances, nor shall the filing of a request for review operate to stay the requirement here imposed. Failure to comply with this requirement shall be grounds for setting aside the election whenever proper objections are filed.

IX. RIGHT TO REQUEST REVIEW

Under the provisions of Section 102.67 of the Board's Rules and Regulations, a request for review of this Decision may be filed with the National Labor Relations Board, addressed to the Executive Secretary, 1099-14th Street. N.W., Washington, DC 20570. This request must be received by the Board in Washington by June 9, 2010.

In the Regional Office's initial correspondence, the parties were advised that the National Labor Relations Board has expanded the list of permissible documents that may be electronically filed with its offices. If a party wishes to file one of the documents which may now be filed electronically, please refer to the Attachment supplied with the Regional Office's initial correspondence for guidance in doing so. Guidance for E-filing can also be found on the National Labor Relations Board web site at www.nlr.gov. On the home page of the website, select the **E-Gov** tab and click on **E-Filing**. Then select the NLRB office for which you wish to E-File your documents. Detailed E-filing instructions explaining how to file the documents electronically will be displayed.

DATED at Chicago, Illinois this 26th day of May, 2010.

/s/ Joseph Baker
Joseph Barker
Regional Director
National Labor Relations Board
Region Thirteen
209 South LaSalle Street, Suite 900
Chicago, Illinois 60606

Cats – election arrangements

362-3350-2000-0000; 362-3350-7000-0000; 370-0733-1700-0000